

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK LEYSE and all others similarly situated,

Plaintiffs,

-against-

BANK OF AMERICA, NATIONAL
ASSOCIATION,

Defendant.

1:09-CV-7654 (JGK) (AJP)

DECLARATION OF KYLE W.K. MOONEY

KYLE W.K. MOONEY, declares as follows:

1. I am an attorney admitted to practice before this Court and am associated with the firm of Morrison & Foerster LLP, which represents Bank of America, National Association (“Bank of America”) in the above-captioned action (“Leyse Action”). This declaration is being submitted in support of Bank of America’s renewed motion to dismiss Plaintiff Mark Leyse’s (“Plaintiff”) Amended Class Action Complaint.

2. On April 12, 2005, Genevieve Dutriaux commenced a putative class action against Bank of America in this Court alleging violations of the Telephone Consumer Protection Act (“TCPA”): *Dutriaux v. Bank of America, National Association*, 1:05-cv-03838-JGK (S.D.N.Y.) (“Dutriaux Action”).

3. Bank of America moved to dismiss the Dutriaux Action on the ground that, *inter alia*, New York C.P.L.R. § 901(b) precluded maintaining a putative TCPA class action, and the Court stayed the Dutriaux Action pending final appeal of two decisions holding that § 901(b) precludes such class actions: *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179 (E.D.N.Y. 2007), *aff’d without opinion*, No. 07-2191 (2d Cir. Oct. 31, 2008) (“Holster Action”) and *Bonime v. Avaya*,

Inc., N0. 06-CV-1630 (CBA), 2006 WL 3751219 (E.D.N.Y. Dec. 20, 2006), *aff'd*, 547 F.3d 497 (2d Cir. 2008). A true and complete copy of the July 14, 2007 Order staying the Dutriaux Action is attached hereto as Exhibit 1. On April 16, 2009, plaintiff in the Holster Action petitioned the United States Supreme Court for a writ of certiorari, which petition has not yet been ruled on (Docket No. 08-1307).

4. On March 10, 2009, Plaintiff Mark Leyse commenced this putative TCPA class action against Bank of America in the United States District Court for the Western District of North Carolina: *Leyse v. Bank of America, National Association*, Case No. 3:09-00097-RJC-DLD (W.D.N.C.). A true and complete copy of the Complaint ("Leyse Complaint") is attached hereto as Exhibit 2.

5. On July 22, 2009, Bank of America moved to dismiss or transfer the Leyse Action, and to award Bank of America its attorneys' fees and costs on the ground that, *inter alia*, Plaintiff's claim was duplicative of the claim in the Dutriaux Action and based on the very same telephone call. True and complete copies of the following memoranda of law and declarations filed in connection with Bank of America's motion are attached hereto:

Bank of America, National Association's Memorandum of Law in Support of its Motion to Dismiss or Transfer this Action and to Award Bank of America's Attorney's Fees and Costs, dated July 22, 2009 (Exhibit 3)

Declaration of Kyle Mooney in Support of Bank of America, National Association's Motion to Dismiss or Transfer this Action, and to Award Bank of America's Attorneys' Fees and Costs, dated July 22, 2009 (Exhibit 4)

Declaration of John Nelson in Support of Bank of America, National Association's Motion to Dismiss or Transfer this Action, and to Award Bank of America's Attorneys' Fees and Costs, dated July 22, 2009 (Exhibit 5)

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss or Transfer this Action, dated August 3, 2009 (Exhibit 6)

Declaration of Mark Leyse, dated August 3, 2009 (Exhibit 7)

Declaration of Todd C. Bank, dated August 3, 2009 (Exhibit 8)

Bank of America, National Association's Reply Memorandum of Law in Support of its Motion to Dismiss or Transfer this Action and to Award Bank of America's Attorney's Fees and Costs, dated August 17, 2009 (Exhibit 9)

6. On September 1, 2009, United States Magistrate Judge Dennis L. Howell issued an Order granting Bank of America's motion to transfer the Leyse Action to the United States District Court for the Southern District of New York, and deferred Bank of America's motion to dismiss and for the award of attorneys' fees and costs for disposition by this Court. A true and complete copy of the September 1, 2009 Order is attached hereto as Exhibit 10.

7. On September 23, 2009, while Bank of America's motion to dismiss and for the award of attorneys' fees and costs was pending, Plaintiff filed an Amended Class Action Complaint ("Amended Leyse Complaint"). A true and compete copy of the Amended Leyse Complaint is attached hereto as Exhibit 11. The Amended Leyse Complaint appears substantially similar to the original Leyse Complaint. The only changes appear to be as follows: (1) an allegation that the Court may exercise jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 (Paragraph 3, Amended Leyse Complaint); (2) an allegation that "[f]ewer than one-third of the plaintiffs are citizens of New York" rather than North Carolina (Paragraph 5, Amended Leyse Complaint); and (3) an allegation that the venue is proper pursuant to 28 U.S.C. § 1391(b)(2) (Paragraph 6, Amended Leyse Complaint).

8. Plaintiff's invocation of federal question jurisdiction under 28 U.S.C. § 1331 (and reliance on 28 U.S.C. § 1391(b)(2)) is improper. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Services, Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998). Nevertheless, because the Amended Leyse Complaint appears substantially the same as the original Leyse Complaint, and because Bank of America already has been forced to incur substantial attorneys' fees and costs in connection with the Leyse Action which it believes is duplicative of the Dutriaux Action,

Bank of America has not submitted herewith an amended memorandum of law in support of this renewed motion. However, if the Court believes that additional briefing on any issue implicated by this renewed motion would be useful, Bank of America promptly will serve and file a supplemental memorandum of law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed October 5, 2009



Kyle W.K. Mooney